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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-924

JOHN PAUL SHELTON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

John Paul Shelton, Petitioner, prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to review an order of that Court dated November 12, 1973, unconditionally revoking petitioner's appeal bond, and unconditionally dismissing petitioner's appeal, from a judgment of the United States District Court for the Northern District of Georgia, dated February 2, 1973, wherein petitioner was convicted and sentenced to serve a term of five years, for violation of the National Motor Vehicle Theft Act.

OPINIONS BELOW

The Order which is sought to be reviewed was issued by the Court of Appeals for the Fifth Circuit on November 12, 1973, Case No. 73-1776 in that Court. It has not yet been officially reported. It makes final a prior conditional order and opinion dated August 2, 1973, which prior order had conditionally dismissed appeal, and conditonally revoked appeal bond. Said prior order and opinion is officially reported in *United States v. Shelton,* (5 Cir. 1973) 482 F.2d 848. The judgment and sentence of the District Court dated February 2, 1973, is not officially reported.

(The above-mentioned orders of the Court of Appeals are printed in the appendix to this petition).

JURISDICTION

The judgment of the Court of Appeals which is now sought to be reviewed was dated and entered November 12, 1973. No orders have been entered respecting a rehearing, extension of time, or stay of mandate. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is *28 USC 1254(1).*

QUESTION PRESENTED FOR REVIEW

Whether a defendant, in a federal criminal case, can legally be deprived of his right to appeal, on the ground that he allegedly became a fugitive, on an unrelated state charge, during pendency of the appeal.

If the answer to this question is in the affirmative, then a subsidiary question is presented, as to whether the burden of proving an existing fugitivity, and the probability of such fugitivity continuing indefinitely into the future, is upon the Government, or whether the burden is on the defendant to prove otherwise.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution:
Due Process of Law Clause
Cruel and Unusual Punishment Clause
Ex Post Facto Clause
Double Jeopardy Clause

Rule 1, Fed. Rules of Appellate Procedure. "(a) Scope of Rules. These rules govern procedure in appeals to United States courts of appeals from the United States district courts."

Local Rule 6 of the United States Court of Appeals for the Fifth Circuit. "PRACTICE. Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

STATEMENT OF THE CASE

On February 2, 1973 in the United States Disrict Court for the Northern District of Georgia, petitioner was sentenced to serve a term of five years, following his conviction by a jury, for violation of the National Motor Vehicle Theft Act. A timely notice of appeal

was filed, and on April 6, 1973, petitioner was released on an appeal bond in amount of $5,000.00, which bond required him to surrender himself in execution of the judgment and sentence appealed from "if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Court of Appeals for the Fifth Circuit."

The appeal bond did not impose any geographical limits, neither did it require petitioner to appear in any state court. The pertinent part of the appeal bond, containing its conditions, is printed in the appendix to this petition.

On June 1, 1973, petitioner timely filed his brief on the merits in the Court of Appeals, seeking reversal of the judgment and sentence. A copy of said brief is being lodged with this Court, for purpose of showing the points raised on the appeal.

There has been no suggestion by either the Court or the Government that the appeal is frivolous, not taken in good faith, or lacking in merit. Neither has there been any suggestion that petitioner has failed to timely perform all the procedural requirements that are necessary to the validity of the appeal.

The Government has never filed any brief on the merits.

On or about June 15, 1973, the Government filed in the Court of Appeals a motion to dismiss the appeal, the sole ground of such motion being an unsworn and

unsupported allegation by Government counsel to the effect that on June 1, 1973, petitioner had become a fugitive in an unrelated state prosecution, wherein petitioner had been sentenced to serve a term of 40 years, following his conviction on a state forgery charge, in Fulton County (Atlanta) Georgia; and, that "In view of the above, the United States of America believes that the appellant has violated the terms of his appeal bond and has left the jurisdiction of the Northern District of Georgia. ... WHEREFORE, it is respectfully requested that the appeal in this case be dismissed without prejudice to the appellant's right to re-open his appeal at some subsequent date."

On June 19, 1973, the Government filed in the Court of Appeals a motion to revoke petitioner's appeal bond, alleging that the Government was informed that petitioner "remains a fugitive from justice from the State of Georgia", and moving the Court of Appeals to revoke petitioner's appeal bond "on the grounds that it appears that Shelton has absconded the jurisdiction of the Court and is in contempt of the authority of this Court, as well as the Fulton County Superior Court." The allegations contained in the motion to revoke bond were not sworn to or otherwise supported by evidence.

On July 3, 1973, petitioner's counsel filed in the Court of Appeals an opposition to the Government's motion to dismiss, averring that petitioner had not violated any of the terms of the federal appeal bond, that he had appeared promptly in the District Court for arraignment, motions, trial and sentence, and that he

had diligently prosecuted his appeal and filed his brief. Petitioner's counsel did not file an opposition to the motion to revoke bail, not having had any notice from the Court that the motion was on the calendar for disposition.

On August 2, 1973, the Court of Appeals handed down an order and opinion conditionally dismissing the appeal, and conditionally revoking appeal bond, and ordering that the cause be "remanded to the District Court which shall schedule a prompt hearing at which appellant shall appear in person (and with counsel, if he wishes) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final".

On September 4, 1973, petitioner's counsel filed in this Court a petition for writ of certiorari, seeking review of the above-mentioned order of the Court of Appeals, on the ground that said order illegally placed the burden on petitioner to show why the appeal should not be dismissed, instead of placing the burden on the Government to show why it should be dismissed. On December 3, 1973, this Court denied the petition for certiorari *(Shelton v. United States, Case No. 73-413, October Term 1973)*. This Court's reasons for denying the petition were of course not given; however it may be significant that the petition was filed out of time, as the Solicitor General pointed out in his Memorandum; also, the order sought to be reviewed was at that time only conditional, and perhaps not a final order in the sense of being ripe for review on certiorari.

On September 18, 1973, while the petition for certiorari was pending in this Court, the District Court in Atlanta held a hearing, pursuant to the order of the Court of Appeals dated August 2, 1973, requiring petitioner to show cause why the appeal should not be dismissed. At this hearing, the Government introduced into evidence exhibits from the Fulton Superior Court reflecting a state court conviction of John Paul Shelton on June 1, 1973, and an ensuing bond forfeiture and bench warrant in June 1973. However the Government did not introduce any evidence or testimony that the Shelton named in the state court exhibits was still a state fugitive as of the date of the federal hearing (September 18, 1973). Petitioner's counsel objected to admission of the state court records, contending that "Mr. Shelton was never arrested on the state charge; that he was never under bond on the state charge; and that he never escaped from custody on the state charge". Petitioner's counsel further contended at the federal hearing on September 18, 1973, that "the burden is upon the government to come forward with evidence to show why his appeal should be revoked and it shouldn't be upon him to show why it shouldn't be." (A copy of the pertinent parts of transcript of the District Court hearing dated September 18, 1973, is printed in the appendix to this petition).

On September 20, 1973, the District Court entered an order which recited: "Insufficient cause having been shown by defendant Shelton or by his attorney, this court concludes that there is no reason why the conditional revocation of Shelton's bond and the conditional dismissal of Shelton's appeal should not be made

final." A transcript of the September 18, 1973 hearing and a copy of the District Court's order of September 20, 1973, was sent to the Court of Appeals, pursuant to that Court's order and opinion dated August 2, 1973.

On November 12, 1973, the Court of Appeals entered its final order and judgment in the case, stating that petitioner had "failed to show cause why the conditional revocation of his bond and the conditional dismissal of his appeal should not be made final. It is ordered that our conditional order is made final and unconditional and appellant's bond is hereby revoked and his appeal is dismissed."

The jurisdiction of the Court of Appeals is based on *28 USC 1291.*

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

The Court of Appeals, in dismissing a criminal appeal because the appellant allegedly was a fugitive on an unrelated state charge (where dismissal on such ground was not provided for in any statute, rule, or prior decision of the Fifth Circuit Court of Appeals) violated petitioner's right to due process of law, and equal protection of the law, and subjected him to cruel and unusual punishment, and so far departed from the usual practice and course of judicial proceedings as

to call for the exercise of this Court's supervisory power.

2.

The Court of Appeals, in dismissing appeal, has inflicted serious punishment on petitioner for allegedly being a fugitive on an unrelated state charge; and in thus punishing petitioner, the Court of Appeals has violated the constitutional doctrine of separation of powers, and has invaded the legislative domain of Congress, which has already provided punishment for flight to avoid prosecution on a state charge *(18 USC 1073)* and for federal bail jumping *(18 USC 3150)*.

3.

The question of whether or not fugitivity constitutes ground for *unconditionally* dismissing an appeal, in a federal criminal case, at the Court of Appeals level, is an important question which has not been, but should now be, decided by this Court.

4.

The judgment of the Court of Appeals, insofar as it placed on petitioner the burden of showing cause why the appeal should not be dismissed, and the bond revoked, is in conflict with a decision of this Court, and with decisions of the other circuits; viz.,

Coppedge v. United States (1962) 369 US 438, 8 L ed 2d 21, 82 S Ct 917.

Christoffel v. United States (D.C.Cir. 1951) 196 F 2d 560, 566.

Rhodes v. United States (4 Cir 1960) 275 F 2d 78, 80.

Bridges v. United States (9 Cir 1950) 184 F 2d 881.

Drew v. United States (D.C. Cir 1967) 384 F 2d 314, 315.

5.

The decision below is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Lannon v. United States* (9 Cir 1968) 401 F 2d 504, where the Court denied the Government's motion to dismiss an appeal from conviction as moot on ground that defendant had jumped bail and was a fugitive.

6.

The decision below, insofar as it purports to hold that absence from the jurisdiction is ground to dismiss an appeal, is in direct conflict with the United States Court of Appeals for the Seventh Circuit in the case of *Borgmeier v. Stone* (7 Cir 1956) 233 F 2d 818, where the Court held that appellant's absence from the jurisdiction did not defeat the appeal, and that appellant was not required to appear in person at a show cause hearing in the District Court to prevent dismissal of the appeal.

7.

In the interest of economy and expediting appeals, this Court should disapprove, as an exercise in futility, the dismissal of appeals on technical grounds, involving such extraneous matters as bail, or speculation on day-to-day whereabouts and intentions of the appellant. The Government could have written a brief, and the Court of Appeals could have decided this appeal, on the merits, with less effort than has already been expended.

ARGUMENT

An appeal in a federal criminal case is a matter of right, and is therefore protected by the due process clause of the Fifth Amendment. A federal Court of Appeals may not refuse to entertain an appeal on the merits unless the appellant fails to timely complete the various procedural steps required by rule and statute. In *Coppedge v. United States* (1962) 369 US 438, 8 L ed 2d 21, 82 S Ct 917, this Court said:

> "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right. (Marginal note omitted). That is, a defendant has a right to have his conviction reviewed by a Court of Appeals, and need not petition that court for an exercise of its discretion to allow him to bring the case before the court. The only requirements a defendant must meet for perfecting his appeal are those

expressed as time limitations within which various procedural steps must be completed." (369 US at pages 441-442).

In the instant case, petitioner timely completed all the procedural steps required by rule or statute, including the filing of his brief in the Court of Appeals. There is no rule or statute in federal practice which authorizes or permits an appeal to be dismissed on ground that the appellant was, is, or may become, a fugitive in connection with the case under appeal, or in connection with an unrelated state case.

Local Rule 6 of the Fifth Circuit Court of Appeals provides:

> "Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

The Fifth Circuit Court of Appeals not only does not have any rule providing for dismissal of criminal appeals on account of fugitivity, but in prior cases where similar questions have been raised the Fifth Circuit Court of Appeals has rejected the proposition that escape or fugitivity deprives the defendant of right to appeal. In *McKinney v. United States* (5 Cir 1968) 403 F 2d 57 the defendant escaped from federal custody seven days after he was sentenced, and thereafter sought to appeal. The Court of Appeals held:

> "The questions presented are (1) whether appellant lost his right to appeal by virtue of

> the escape ... We answer the first question in the negative ...
>
> "It is settled that an appeal from a judgment in a federal district court is a matter of right. (Citations omitted). Moreover there is some authority for the proposition that federal appeals should not ordinarily be dismissed even where the appellant flees the jurisdiction." (403 F 2d at pages 58-59).

Inasmuch as there is no rule, statute, or Fifth Circuit precedent for dismissing a federal criminal appeal on account of past, present, or future fugitivity, it was a denial of due process of law to make this petitioner the first victim of this newly announced, *ex post facto* rule of the Fifth Circuit Court of Appeals.

In "unconditionally" dismissing the appeal the Court of Appeals has inflicted serious punishment on petitioner for an alleged offense not related to the federal case and not affecting the validity of the federal appeal; viz., the alleged offense of being a fugitive. Congress has provided punishment of up to five years for flight to avoid prosecution or confinement on a state charge *(18 USC 1073)*. Congress has also provided punishment of up to five years for federal bail jumping *(18 USC 3150)*. The Court of Appeals by inflicting the additional punishment of dismissing appeal, over and above the punishment provided by Congress, has invaded the legislative domain, in an *ex post facto* manner.

The severe punishment of unconditionally dismissing appeal for being an alleged fugitive violates the constitutional provision against cruel and unusual punishment, in that it deprives petitioner of direct review of his present five year sentence, which might otherwise be reversed on appeal. It is both cruel and unusual to deprive a defendant of a constitutionally protected right, regardless of the sins of commission or omission the defendant has committed.

The lower court's "punishment" of petitioner for allegedly jumping bail and/or being a fugitive on a state charge creates a potential double jeopardy question, if petitioner should be prosecuted at some later date for flight to avoid prosecution or bail jumping.

If the practice of dismissing federal appeals on ground of fugitivity is approved by this Court, it is possible that in future cases a defendant with a life sentence, or even sentence of death, will be deprived "unconditionally" of his right to appeal, by reason of a brief period of fugitivity, and thus be subjected to execution of an illegal life or death sentence, that might otherwise have been reversed on direct appeal.

The lower court's reliance on *Molinaro v. New Jersey* (1970) 396 US 365, 24 L Ed 2d 586, 90 S Ct 498 is misplaced. In *Molinaro*, this Court had before it an appeal from the New Jersey Supreme Court, which had affirmed Molinaro's conviction for abortion. This Court was informed by both appellant's counsel and counsel for the State that Molinaro, who was free on bail, had failed to surrender himself to state authori-

ties. His bail had been revoked. This Court dismissed the appeal, stating: "While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims." (396 US at page 366).

Appeals to this Court from the highest state courts are significantly different from federal appeals to the Courts of Appeals. This Court has discretion to dismiss appeals for any reason it sees fit; it would be physically impossible for this Court to review all the cases that "may" be brought before it. It has never been held that appeals to this Court may be taken "as a matter of right" or that they are constitutionally protected. Before a case reaches this Court, it has usually had appellate review, as in *Molinari*, where the New Jersey Supreme Court had entertained his appeal. By contrast, a United States Court of Appeals has no authority or discretion to dismiss an appeal in a federal criminal case unless it is frivolous, not taken in good faith, or the appellant fails to timely complete the various procedural steps required by rule or statute; or, in the Fifth Circuit, has failed to follow the practice "customarily followed in this court" *(Local Rule 6, supra)*, if the practice is not fixed by statute or rule.

There is no precedent in the Fifth Circuit or any other Circuit Court of Appeals for dismissing an appeal because the appellant was allegedly a fugitive on an unrelated state charge.

The court below cited three cases from other federal courts of appeals where appeals had been dismissed upon an uncontroverted showing by the Government that the appellants during pendency of appeal had left the territorial jurisdiction of the court. It is petitioner's contention that (1) these three decisions were erroneous, and should be overruled, and (2) these three cases are factually distinguishable from the instant case.

In *Johnson v. Laird* (9 Cir 1970) 432 F 2d 77, cited by the court below, the appellant was appealing from an adverse ruling in a habeas corpus proceeding, wherein he was seeking release from the Army as a conscientious objector. At the oral hearing on the appeal, the court was informed that the appellant was AWOL, was being sought by military authorities as a deserter, and when last heard from was out of the country. Appeal dismissed.

In *United States v. O'Neal* (10 Cir 1972) 453 F 2d 344, cited by the court below, the appellant during pendency of appeal was ordered to show cause why the conditions of his bond should not be modified. The opinion does not indicate the reason for the show cause order. At any rate the appellant failed to appear at the show cause hearing and his appeal bond was forfeited. The Government moved for dismissal of the appeal "on the grounds that he has fled the jurisdiction of the Court". The motion to dismiss was granted.

In *United States v. Dawson* (6 Cir 1965) 350 F 2d 396, the court in dismissing the appeal stated that the appellant had "fled the jurisdiction of the District

Court" and that the appeal was being dismissed as "both frivolous and moot".

In the instant case, petitioner's appeal bond did not restrict him to any geographical location. By its terms he was free to go anywhere he chose during pendency of appeal. This effectively distinguishes the instant case from the three cases mentioned above, as it appears that in each of those cases, the appellants were restricted to the geographical jurisdiction of the District Courts.

In the instant case the Court of Appeals at time of unconditionally dismissing the appeal did not give petitioner any grace period in which to appear in order to keep his appeal alive or have it reinstated. By contrast, the Courts of Appeals for the Ninth, Tenth, and Sixth Circuits, in the *Johnson, O'Neal* and *Dawson* cases, *supra,* gave the appellants 30 days in which to surrender.

The Government may attempt to argue that dismissal of appeal is warranted because petitioner did not appear in person at the show cause hearing in the District Court on September 18, 1973, and that this failure to appear justified revocation of the appeal bond, which in turn justified dismissal of appeal. This is a bootstrap type of argument designed to escalate fugitivity on a state charge to violation of a federal appeal bond. The fact that the alleged state fugitivity was the sole basis for the Government's seeking dismissal of appeal in the first instance is shown by the wording of the motion to dismiss, which recites that, because

of the alleged state fugitivity, "the United States Government believes that the appellant has violated the terms of his appeal bond and has left the jurisdiction of the Northern District of Georgia". Similarly, the Government's motion to revoke appeal bond was based solely on the alleged state fugitivity. Said motion to revoke bond recited that the Government was informed that petitioner "remains a fugitive from justice from the State of Georgia", and moved the Court to revoke the bond on the ground that such alleged fugitivity made it appear that petitioner had "absconded the jurisdiction of the Court and is in contempt of the authority of this Court, as well as the Fulton County Superior Court".

The Government's main premise, that petitioner violated the terms of his federal appeal bond, by leaving the jurisdiction of the court, is erroneous, because said appeal bond contained no geographical restrictions.

The Government's speculative unsworn allegation that petitioner had absconded the jurisdiction of the Court of Appeals had no basis in fact, and furnished no legal basis for the show cause hearing ordered by the Court of Appeals.

At any rate, mere absence from the Court's geographic jurisdiction does not defeat an appeal. In *Borgmeier v. Stone* (7 Cir. 1956) 233 F 2d 818, a federal district judge in a civil case entered a rule to show cause which provided that upon failure of appellant to submit herself to the jurisdiction of the District Court for determination of certain controversial mat-

ters, the appeal would be dismissed. Reversing, the Court of Appeals held

> "Respondent also argues that petitioner lost any right of appeal 'by staying outside the jurisdiction' . . . We hold to the contrary." (233 F 2d at page 820).

The Court of Appeals further held that the rule to show cause was "entered without any authority", and that it should be "expunged from the record." (233 F 2d at page 820).

The judgment of the lower court, insofar as it placed the burden on petitioner to show cause, is by analogy in conflict with a controlling decision of this Court respecting burden of proof when the Government seeks to prevent a ruling on the merits in a federal appeal. In *Coppedge v. United States, supra,* 369 US 438, the Government sought to prevent an appeal in forma pauperis on the ground that the appeal was frivolous. This Court said:

> "Since our statutes and rules make an appeal in a criminal case a matter of right, the burden of showing that that right has been abused through the prosecution of frivolous litigation should, at all times, be on the party making the suggestion of frivolity. It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he

makes a rational argument on the law or facts." (369 US at pages 447-448).

Even if the order of the lower court was legally permissible in revoking appeal bond, it was still illegal in dismissing the appeal. The granting of bail on appeal is discretionary, but entertaining an appeal on the merits is mandatory under conditions existing in the instant case. By arguing thus we do not concede that the revocation of bond was not an abuse of discretion under the circumstances shown; we merely point out that the legal argument against dismissal of appeal stands on a somewhat different, and stronger, footing, than the argument against revocation of bond.

The order of the Court of Appeals dated August 2, 1973, ordering petitioner to show cause why his appeal should not be dismissed, was "entered without any authority", as in *Borgmeier v. Stone, supra.* Even if petitioner was a fugitive, temporarily, on the state charge, he had not violated any of the terms of his federal appeal bond, hence there was no legal basis for the Court of Appeals to place on petitioner the burden of showing cause why his appeal should not be dismissed. The judgment of the Court of Appeals which is now sought to be reviewed recites that "Appellant has failed to show cause why the conditional revocation of his bond and the conditional dismissal of his appeal should not be made final." Insofar as the order of the Court of Appeals placed the show cause burden on petitioner, it is in conflict with the following decisions from other Circuits, which hold that the burden is on the

Government, when the Government moves to deny, modify or revoke bail, to make a proper showing:

Christoffel v. United States (D.C.Cir 1951) 196 F 2d 560, 566.

Rhodes v. United States (4 Cir 1960) 275 F 2d 78, 80.

Bridges v. United States (9 Cir 1950) 184 F 2d 881.

Drew v. United States (D.C. Cir 1967) 384 F 2d 314, 315.

Plain logic and the orderly administration of justice militate against dismissing an appeal, where the appellant has already filed his brief, solely upon the ground of alleged fugitivity. We are not at liberty to assume that all escaped defendants will never return to the jurisdiction, either voluntarily or involuntarily. A very large percent of fugitives, both state and federal, are apprehended by the FBI. In the instant case there is no evidence that the Shelton named in the state prosecution is not prosecuting an appeal from the sentence imposed by the state, and that he intends to surrender himself to federal and/or state authorities at such time as the respective appeals are decided. Should he not surrender, the FBI would in all probability apprehend him, at which time he would undoubtedly seek collateral relief under *28 USC 2255*, and the Government eventually would have to defend on the merits most of the issues which were raised on the direct appeal (most of which issues, as petitioner's brief indicates, involve constitutional questions). Noth-

ing is to be gained by postponing the litigation. The petitioner's presence is not required at this stage of the appeal; indeed it would be most unusual for an appellant to report to the court during pendency of an appeal. The petitioner subjected himself to the jurisdiction of the Court of Appeals, when he signed the appeal bond, to surrender himself "in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of said District Court against him shall be affirmed by the said United States Court of Appeals for the Fifth Circuit." There is no evidence in this case that petitioner will not meet his obligation under this bond, upon disposition of his appeal.

At a time when this Court and other federal courts are developing new rules and procedures for expediting criminal appeals, it would be inconsistent to approve dismissal of an appeal as punishment for alleged fugitivity, as the petitioner will in all probability be apprehended, if he does not voluntarily surrender, and the litigation over alleged trial errors will begin anew.

If the lower court should be required by this Court to entertain the appeal, and if the sentence imposed by the District Court should be reversed, petitioner still would not be free, as he is merely asking for a new trial. Upon reversal, he would be required to surrender to the District Court for re-trial.

If this Court should sanction the lower court's dismissal of appeal, Government attorneys would be encouraged to harass other defendants with show cause

motions respecting bail, or modification of bail terms, and thus avoid filing a brief on the merits of the appeal. This device would also enable the Government to keep more defendants in jail pending appeal, which is against the policy of the Bail Reform Act. Many defendants would either be kept in jail or their appeals would be dismissed on the technicality of fugitivity, which has no bearing on the validity of an appeal.

In the instant case the lower court gave the Government more than it asked for. The Government's motion to dismiss appeal recited: "WHEREFORE, it is respectfully requested that the appeal in this case be dismissed without prejudice to the appellant's right to re-open his appeal at some subsequent date." At the very least, the order of the lower court should be modified from "unconditional" dismissal of appeal, to dismissal "without prejudice to the appellant's right to re-open his appeal at some subsequent date."

We respectfully submit that in the interest of economy and expediting appeals, this Court should disapprove, as an exercise in futility, the dismissal of appeals on technical grounds, involving such extraneous matters as bail, or speculation on day-to-day whereabouts and intentions of the appellant. The Government could have written a brief, and the Court of Appeals could have decided this appeal, on the merits, with less effort than has already been expended.

CONCLUSION

For the foregoing reasons it is submitted that the writ of certiorari should issue.

Respectfully submitted

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Decatur, Georgia 30030

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify this 11th day of December, 1973, that I have served three copies of the foregoing petition for writ of certiorari and the attached appendix on the United States by mailing same, postage prepaid, to Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C.

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ATTORNEY FOR PETITIONER

APPENDIX

APPEAL BOND DATED APRIL 6, 1973

The appeal bond recites, in pertinent part:

"NOW, the condition of the above obligation is such, that if the said John Paul Shelton shall appear in the United States Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held in the city of New Orleans, Louisiana, or Atlanta, Georgia, and from day to day and from term to term thereafter until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue, and effect."

ORDER AND OPINION OF THE COURT OF APPEALS DATED AUGUST 2, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1776

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN PAUL SHELTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(August 2, 1973)

Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

BY THE COURT: Shelton was convicted in federal district court of interstate transportation and concealment of a stolen motor vehicle, was sentenced to two concurrent five-year terms on February 2, 1973, and filed notice of appeal on March 5. The District Court

granted Shelton release pending appeal on condition of $5,000 bond with surety.

On June 1 Shelton escaped from state custody during his trial on state charges of forgery.[1] He was found guilty on the forgery charges, his state bond was forfeited and a bench warrant issued. He remains at large. On June 1, the same day that Shelton escaped, his pro se brief in the appeal from the federal conviction was filed in this court.

On June 18 the District Court held a show cause hearing in response to a motion by the U.S. Attorney to revoke or forfeit the appeal bond. Shelton did not appear at that hearing nor was he represented by counsel.[2] The District Court determined that it lacked jurisdiction to order forfeiture of the bond.[3]

The United States has now filed with this court a motion to revoke or forfeit Shelton's appeal bond and a motion to dismiss the appeal on the basis that Shelton has absconded and defied the authority of this court. An attorney, who did not represent Shelton in the trial of the federal charge or of the state charge, has filed a response to the government's motions contending

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[1]While the jury was deliberating.

[2]The attorneys who represented Shelton in the state proceedings advised the District Court that they did not represent Shelton in his federal appeal.

[3]The conditions of the bond are that Shelton appear before this court, abide by and obey its orders, and surrender himself if his conviction is affirmed. There are no conditions limiting Shelton to remaining within any particular geographical area pending his appeal.

that Shelton has neither breached the conditions of the federal bond nor evidenced any intent not to obey the judgment of this court.

An appellate court has the power and authority to dismiss the appeal of an appellant who has escaped from custody or jumped bail, the rationale being variously expressed as disentitlement of the appellant to call upon the resources of the court to consider his claim, as discretion of the court to refuse to consider the claim of a litigant who indicates that he will comply with the court's decree only if it is favorable, or as the lack of a justiciable controversy. *Molinas v. New Jersey*, 396 U.S. 692, 24 L.Ed. 2d 586 (1970); *Eisler v. U.S.*, 338 U.S. 189, 93 L.Ed. 1897, *dism'd* 338 U.S. 883, 94 L.Ed. 542 (1949); *Smith v. U.S.*, 94 U.S. 97, 24 L.Ed. 32 (1876); *Johnson v. Laird*, 432 F.2d 77 (CA9, 1970); *U. S. v. O'Neal*, 453 F.2d 344 (CA10, 1972); *U.S. v. Dawson*, 350 F.2d 396 (CA6, 1965). In this instance the custody fled is that of another sovereign and upon a charge unrelated to that embraced in the federal appeal. We conclude, however, that the escape from state custody, the subsequent state conviction, the revocation of the state bond, the fact that Shelton remains at large despite the existence of the state bench warrant, and the fact that the response filed in this court contains no indication of his whereabouts nor any affirmative averments that he intends to submit himself to jurisdiction of this court or of the State of Georgia, constitute sufficient probable cause for this court to conclude that appellant will not comply with orders of this court and will abide its decree only if favorable to him. We therefore conditionally revoke

his appeal bond and conditionally dismiss his appeal. The cause is remanded to the District Court which shall schedule a prompt hearing at which appellant shall appear in person (and with counsel, if he wishes) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final. Copies of this order and of the District Court's order setting the matter for hearing shall be served upon counsel who filed the response in this court, upon appellant's counsel in his state trial, and a copy of each mailed to appellant's last known address. A transcript of the District Court hearing shall be certified to this court.

The motions of the United States are conditionally GRANTED and the CAUSE REMANDED to the District Court for further proceedings as hereinabove provided.

TRANSCRIPT OF PROCEEDINGS HAD BEFORE UNITED STATES DISTRICT JUDGE MOYE IN ATLANTA ON SEPTEMBER 18, 1973

UNITED STATES OF AMERICA
VS. JOHN PAUL SHELTON

CRIMINAL CASE NO 27,314

APPEARANCES OF COUNSEL:

For the Government: Anthony Arnold
For Defendant: William V. Hall, Jr.

* * *

THE COURT:
Are you in contact with the defendant?

MR. HALL:
Yes, sir. . . I do not know where he is. I have been in contact with him telephonically only, sir.

* * *

MR. ARNOLD:
Your Honor, at this point, for the record I'd like to tender two exhibits. The first being a certified, exemplified copy of the bench warrant issued for John Paul Shelton by Fulton County . . . to establish that he is a fugitive from Fulton County . . . the reason I wanted to tender these documents is actually just to bolster the record because some of the averments that he is a fugitive are not actually supported by any evidence . . . The first one would be the copy of the bench warrant. And the second one would be the indictment, verdict and sentence upon which it was issued.

* * *

THE COURT:
All right. Any objection to the admission of these documents?

MR. HALL:
If it please the Court . . . the averments contained in the motion filed before the Fifth Circuit Court of Appeals in this case are in substance that the defendant, J. Paul Shelton, has escaped from the Fulton Coun-

ty Courthouse; that he is therefore a fugitive from justice. The fact that the bench warrant has issued subsequently to his conviction in the case has no relevance to the question of his escape.

* * *

THE COURT:

What is your offer of proof?

MR. HALL:

My offer of proof is that Mr. Shelton was never arrested on the state charge and that he never escaped from custody on the state charge.

THE COURT:

How are you going to prove that?

MR. HALL:

By the State's own records.

THE COURT:

All right. I will give you two days in which to supply certified, exemplified, triple sealed documents, elaborating what is the record in that case . . . I take it the appellant, John Paul Shelton, is not here.

MR. HALL:

That is correct, Your Honor.

* * *

THE COURT:

All right, sir. Then do you have anything to show why the conditional revocation of his bond and the conditional dismissal of his appeal should not be made final? If so, what is it?

MR. HALL:

If it please the Court . . . the burden is upon the Government to come forward with evidence to show why his appeal bond should be revoked and it shouldn't be upon him to show why it shouldn't be . . . Well, as counsel for the government states, they didn't come forth with anything to start off with . . . there was no evidence before the Court of Appeals in any form, in any wise, we take it, to authorize the revocation.

THE COURT:

Well, that's the problem with the Court of Appeals . . . They gave the appellant the opportunity to appear at this hearing — and I don't know why they sent it to me; I guess I'm just being a Special Master — to say his peace if he wanted to say his peace . . . I find that the defendant does not appear in person; that he has shown no cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final; and that he has submitted nothing, and, therefore . . . If I have the power to revoke it, I hereby revoke it. If I don't have the power to revoke it, I recommend that the Court of Appeals revoke it.

ORDER OF DISTRICT COURT DATED 9-20-73

United States of America,

Plaintiff

versus Criminal No. 27,314

John Paul Shelton,

Defendant

ORDER OF THE COURT

In a trial before this court John Paul Shelton was convicted of interstate transportation and concealment of a stolen motor vehicle, and sentenced to two concurrent five-year terms on February 2, 1973. Upon filing notice of appeal on March 5, 1973, this court allowed Shelton released pending appeal on a $5,000.00 surety bond.

On the same day Shelton's appeal in this case was filed in the Fifth Circuit Court of Appeals, Shelton escaped from the state court trial where he was found guilty of forgery. His state bond was forfeited and a bench warrant was issued for Shelton's arrest.

After first seeking to revoke Shelton's appeal bond in this court, the United States Attorney filed in the Fifth Circuit Court of Appeals motions to revoke or forfeit Shelton's appeal. The Fifth Circuit conditionally revoked Shelton's appeal bond and conditionally dismissed his appeal, and remanded the matter to this court to conduct a hearing at which Shelton should appear personally and show cause why the conditional revocation of his bond and the conditional dismissal of his appeal should not be made final. *United States of America v. John Paul Shelton*, 5th Cir., No. 73-1776; filed August 2, 1973.

Shelton and his attorney, William V. Hall, Jr., were notified to be present at the hearing conducted September 18, 1973. Mr. Hall appeared; however, Shelton failed to appear. Mr. Hall gave no explanation for Shelton's failure to appear. Although Hall stated that he had been in telephonic contact with Shelton, he was not aware of Shelton's whereabouts. The United States Attorney introduced exhibits reflecting Shelton's state court conviction and sentence of June 1, 1973, and the ensuing bond forfeiture and bench warrant.

Insufficient cause having been shown by defendant Shelton or by his attorney, this court concludes that there is no reason why the conditional revocation of Shelton's bond and the conditional dismissal of Shelton's appeal should not be made final.

It is directed that the Clerk of this court forward this order and a certified copy of the transcript of the September 18, 1973, hearing to Clerk, Fifth Circuit Court of Appeals, for filing with United States v. Shelton, No. 73-1776.

It is so ordered, this ____ day of September, 1973.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

FILED IN DISTRICT COURT
9-20-73

Presented by:
/s/ Anthony M. Arnold
ANTHONY M. ARNOLD
Assistant United States Attorney

FINAL ORDER OF COURT OF APPEALS UPON WHICH REVIEW WAS SOUGHT, DATED NOVEMBER 12, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1776

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN PAUL SHELTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(November 12, 1973)

Before BELL, GODBOLD and INGRAHAM, Circuit Judges.

BY THE COURT:

The District Court has scheduled a show cause hearing in accordance with our remand of August 2, 1973 and certified a transcript thereof to this court. Appel-

lant has failed to show cause why the conditional revocation of his bond and the conditional dismissal of his appeal should not be made final.

It is ORDERED that our conditional order is made final and unconditional and appellant's bond is hereby REVOKED and his appeal is DISMISSED.

SUPREME COURT, U. S.

FILED

FEB 28 1974

MICHAEL RODAK, JR., CLERK

No. 73-924

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-924

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District for the Northern District of Georgia, petitioner was convicted on two counts of interstate transportation and concealment of a stolen motor vehicle. He was sentenced to five years' imprisonment on each count, the terms to run concurrently. Upon filing a notice of appeal on March 5, 1973, the district court allowed petitioner to be released on a $5,000 surety bond pending appeal. On April 6, 1973, petitioner was so released (Pet. App. 1a), and on June 1, 1973, he filed a *pro se* brief on the merits in the court of appeals. That same day, petitioner fled the jurisdiction of the State of Georgia while the jury was deliberating during his trial on state charges of forgery. He was found guilty on the forgery charges, his state bond was forfeited, and a bench warrant issued. Petitioner remains at large.

On June 18, 1973, the district court held a show cause hearing in response to a government motion to revoke or forfeit petitioner's appeal bond. Petitioner did not appear at the hearing, nor was he represented by counsel. The district court determined that it lacked jurisdiction to order forfeiture of the appeal bond.[1]

The government then filed a motion with the court of appeals to revoke or forfeit petitioner's appeal bond and to dismiss the appeal on the basis that petitioner had absconded and defied the court's authority. On August 2, 1973, the court of appeals conditionally revoked his appeal bond and conditionally dismissed his appeal, 482 F.2d 848 (C.A. 5), certiorari denied, No. 73-413, December 3, 1973 (Pet. App. 2a-5a). The case was remanded to the district court for a hearing, at which time petitioner was to "appear in person (and with counsel, if he wished) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final" (*id.* at 5a). On September 18, 1973, the hearing was held (Pet. App. 5a-8a). Petitioner did not appear, as required by the court of appeals, although he was represented by counsel. At that time petitioner's counsel stated that he did not know petitioner's whereabouts, although he had talked to him over the telephone (Pet. App. 6a).

On September 20, 1973, the district court found that "there is no reason why the conditional revocation of Shelton's bond and the conditional dismissal of [his]

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[1]The conditions of the bond were that petitioner appear before the Court of Appeals for the Fifth Circuit, abide by and obey its orders, and surrender himself if his conviction is affirmed. There were no conditions limiting petitioner to a particular geographical area.

appeal should not be made final" (Pet. App. 9a-10a). On November 12, 1973, the court of appeals entered a final and unconditional order revoking petitioner's bail and dismissing his appeal from the revocation of bail[2] (Pet. App. 11a-12a). The petition for a writ of certiorari, which rehashes the same arguments made in the petition for a writ of certiorari filed after the conditional dismissal of the appeal (No. 73-413), and which were fully answered in our Memorandum In Opposition, was not filed until December 13, 1973, and is out of time under Rule 22(2) of the Rules of this Court.

In any event, since petitioner remains a fugitive, further review of the revocation of his appeal bond is not appropriate. *Molinaro* v. *New Jersey,* 396 U.S. 365. Moreover, the dismissal of petitioner's appeal from the judgment of conviction for want of prosecution and for failure to file a timely appeal (see *supra,* n. 2, which took place on January 8, 1974, renders the issue moot.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2]The petition for a writ of certiorari is from the November 12, 1973 decision. The dismissal of the appeal from the judgment of conviction occurred subsequent to the filing of this petition. The mandate of the court of appeals issued on January 11, 1974.

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SUPREME COURT, U. S.

FILED
APR 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-924

JOHN PAUL SHELTON, PETITIONER

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR REHEARING

PIERRE HOWARD, SR.
WILLIAM V. HALL, JR.

HOWARD, HOWARD AND HALL
600 First National Bank Bldg.
Decatur, Georgia 30030

Attorney for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-924

JOHN PAUL SHELTON, PETITIONER

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING

The petitioner, John Paul Shelton, hereby petitions for a rehearing in the above-styled case, upon the following grounds, and for the following reasons:

GROUND 1

This Court should not irrevocably foreclose petitioner's right to appeal his federal conviction unless and until the state courts of Georgia have taken similar action with respect to the state conviction, which gave rise to the allegation of state fugitivity, which state fugitivity is relied upon by the Government as ground for dismissing the federal appeal.

Intervening circumstances relative to the state case should be considered. The undersigned counsel represents petitioner in his appeal in the state case. Notice of appeal to the Court of Appeals of Georgia was timely filed June 29, 1973. On December 19, 1973, the State filed a motion to dismiss the appeal on the ground, *inter alia*, that "defendant is and has been since prior to the imposition of sentences in said case a fugitive and without standing to appeal or apply to the Court for any order in furtherance of an appeal". However the State abandoned this motion; at any rate it has never been ruled upon adversely to petitioner. On March 22, 1974, the undersigned counsel filed a brief on the merits in the Court of Appeals of Georgia on petitioner's behalf.[1] (The delay in filing brief was occasioned by failure of the Court Reporter to complete the trial transcript until February 12, 1974, although the transcript had been ordered out by the undersigned counsel on June 29, 1973.) At the present time (April 6, 1974) no motion to dismiss the state appeal is pending in the Court of Appeals of Georgia. If such a motion should be filed, petitioner would oppose it on the ground that the Georgia Appellate Practice Act of 1965 forbids dismissal of the appeal on ground of fugitivity. This Act recites in its title that it is an Act to "comprehensively" revise appellate procedure, and "to define the instances in which an appeal may be dismissed" (Acts 1965, page 18). When the Act was amended in 1968, the title to the Amendment recited that the Act was "to provide that no appeal shall be

[1] A copy of the state brief is being filed herewith as an exhibit. The Court's attention is respectfully directed to pages 27-28, 86-90 of said brief, relative to circumstances of petitioner's "voluntary" absence from the last part of his state trial.

dismissed except under certain conditions" (Acts 1968, page 1072). The pertinent Section of the Act as it exists today commands:

Ga. Code Ann. 6-809(b):

> "(b) No appeal shall be dismissed or its validity affected for any cause or consideration of any enumerated error refused, except for: (1) failure to file notice of appeal within the time required as provided in this Act or within any extension of time granted hereunder; (2) where the decision or judgment is not then appealable, or (3) where the questions presented have become moot . . ."

The foregoing provisions of the Act appear to be in response to, or at least in conformity with, the oft-expressed views of former Chief Justice Duckworth of the Georgia Supreme Court, who repeatedly expressed the view that appeals should not be dismissed on ground of fugitivity. In *Ramsey v. State* (1957) 212 Ga. 793, 96 SE 2d 250, the Georgia Supreme Court, prior to adoption of the above-mentioned Act, dismissed an appeal on ground of fugitivity. Justice Duckworth said:

> "I concur in the judgment because of the case cited, and many others to the same effect, but I would prefer to overrule all such cases and decide the questions presented by this record. It is only in this manner that I can discharge fully the duties laid upon me by the Constitution and my oath to decide questions of law properly presented as the questions here are presented. But since the required number of the Justices to overrule those decisions cannot be obtained, they are controlling law of this State and I must follow them."

The above view was reiterated by Justice Duckworth in *Blalock v. State* (1959) 215 Ga. 61, 108 SE 2d 715, and in *Crane v. State* (1957) 213 Ga. 386, 98 SE 2d 903.

This view is now the law in Georgia, by virtue of *Section 6-809(b), supra.*

It would be anomalous if the state appellate court in this case should reject the proposition that fugitivity is ground for dismissing the appeal, while this Court approves the Government's argument that the state fugitivity is ground for dismissing the federal appeal.

This Court should at least hold the case open, pending the outcome of the state appeal and a ruling by the Court of Appeals of Georgia as to whether or not fugitivity will be considered as ground for dismissing the state appeal.

GROUND 2

This Court in denying petition for writ of certiorari may have mistakenly relied upon certain erroneous statements of fact contained in the Government's Opposition; to-wit:

(a) The Government erroneously asserted that the petition for writ of certiorari was "out of time" (Mem. 3). Actually, Justice Powell on December 13, 1973, extended the time for filing petition to December 19, 1973. The petition was docketed December 13, 1973, hence was not out of time.

(b) The Government erroneously states in its Memorandum in Opposition, page 3, marginal note 2, that dismissal by the court below of appeal from judgment of conviction occurred "subsequent to the filing of this petition". Actually, the lower court dismissed the appeal in an Order dated November 12, 1973. This particular Order is the one upon which review is sought in the instant proceeding in this Court. A copy of said Order appears at page 11a of the petition for writ of certiorari.

(c) The Government erroneously suggests that the instant petition for writ of certiorari "rehashes the same arguments made in the (prior) petition for a writ of certiorari filed after the conditional dismissal of the appeal" (referring to Case No. 73-413 in this Court). Actually, the instant petition raises, for the first time, the issue that appeal is a matter of right, constitutionally protected; furthermore, the instant petition is concerned primarily with the "final" dismissal of the "appeal" by the court below, while the prior petition was concerned primarily with the "conditional" revocation of "appeal bond".

CONCLUSION

For the foregoing reasons petitioner respectfully prays that the Court will grant a rehearing and reverse the judgment below; in the alternative, petitioner prays that the Court will retract or suspend its order denying petition for writ of certiorari, or otherwise keep this case open pending disposition of the state appeal with respect to question of whether fugitivity will constitute ground for dismissing the state appeal.

Respectfully submitted,

PIERRE HOWARD, SR.
WILLIAM V. HALL, JR.
HOWARD, HOWARD AND HALL
600 First National Bank Bldg.
Decatur, Georgia 30030

Attorney for Petitioner

CERTIFICATE OF COUNSEL PURSUANT TO RULE 58

The undersigned counsel hereby certifies that the foregoing petition for rehearing is filed in good faith and not for delay, and that the grounds set forth in said petition for rehearing are restricted to the grounds specified in Rule 58, paragraph 2, of the Rules of this Court.

WILLIAM V. HALL, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify this 9th day of April, 1974, that I have served three copies of the foregoing petition for rehearing on the United States by mailing same, postage prepaid, to Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C.

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